

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

TAMARA K. RANK)	
Claimant)	
VS.)	
)	Docket No. 1,004,647
STAR LUMBER & SIGN SUPPLY CO. INC.)	
Respondent)	
AND)	
)	
EMPLOYERS MUTUAL CASUALTY COMPANY)	
Insurance Carrier)	

ORDER

Claimant requested review of Administrative Law Judge Bruce E. Moore's September 18, 2002, preliminary hearing Order.

ISSUES

The Administrative Law Judge (ALJ) denied claimant's request for preliminary hearing benefits for an alleged neck and right arm injury caused by claimant's work activities while employed by respondent. The ALJ found claimant failed to prove she suffered an accidental injury arising out of and in the course of her employment. The ALJ further found claimant failed to provide respondent with timely notice of accident.

Claimant appeals and contends she proved through her testimony and the medical records admitted at the preliminary hearing that she injured her neck and right arm while performing her work activities for respondent. Also, claimant argues she proved through her testimony and the testimony of her friend, Wayne Cook, that she provided respondent with timely notice of the accident.

But respondent contends the Appeals Board (Board) should affirm the preliminary hearing Order. Respondent argues claimant's testimony was not credible as her testimony was inconsistent on both the issues of accidental injury and timely notice. Additionally, respondent argues the medical opinions contained in the medical records on causation are not persuasive because claimant failed to provide the doctors with an accurate medical history. Moreover, respondent's representatives provided testimony that contradicted claimant's testimony both on causation and timely notice.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the preliminary hearing record and considering the parties briefs, the Board makes the following findings and conclusions:

The Board finds the preliminary hearing Order should be affirmed. The Board agrees with the ALJ's analysis of the evidence and his findings and conclusions contained in the preliminary hearing Order. It is, therefore, not necessary to repeat those findings and conclusions in this Order. The Board adopts those findings and conclusions as its own as if fully set forth herein.

Claimant commenced working for the respondent in September 2000 as manager of the respondent's flooring and decorating store located in Salina, Kansas. In December 2001, claimant also became the manager of respondent's outlet store located in Salina, Kansas. Claimant testified that, although she worked in a management position, she was also required to perform heavy physical labor consisting, among other duties, of unloading and loading heavy tile flooring and wallpaper, hanging heavy rugs and performing various janitorial duties in order to keep the store clean.

Claimant testified she was under extreme pressure to satisfactorily perform the management responsibilities of running both of those stores. Claimant was terminated by the respondent on March 28, 2002, because the stores had not met respondent's financial expectations under claimant's management.

In March 2001, because of the long hours claimant was required to work and the heavy activities she was required to perform, claimant alleges her upper back, neck and right upper extremity became symptomatic. As she continued to work for the respondent, those symptoms worsened through her last day worked of March 28, 2002.

For relief of those symptoms, claimant on occasion went to a local chiropractor, Dr. Richard Pennington, for treatment. In the preliminary hearing record, claimant testified on three different occasions. On July 22, 2002, claimant testified by deposition. On August 9, 2002, claimant testified at the preliminary hearing before the ALJ. Finally on August 23, 2002, claimant testified again by deposition. During claimant's July 22, 2002, deposition testimony, claimant answered, "No" to the question of whether she ever had neck or back problems before she worked for respondent.¹ But Dr. Pennington's records admitted into the preliminary hearing record indicate claimant received chiropractic treatment for upper back and neck pain since 1993 with the last treatment noted as of May 6, 2002.²

¹ Cl. Depo. at 63.

² Cl. Depo., Cl. Ex. 1.

Before respondent terminated claimant, she never requested medical treatment for her alleged neck and right arm injury.³ But after the termination, claimant returned to Dr. Pennington for chiropractic treatment on April 10, 2002, April 15, 2002, April 26, 2002, and May 6, 2002. Dr. Pennington's records do not have any notation that claimant's request for treatment for her upper back and neck problems were related to her work for respondent.⁴

Claimant saw her family physician Kevin Norris, M.D. on April 16, 2002, for a well-woman checkup. At that time, claimant also gave Dr. Norris a history of injuring her back one week ago lifting rugs. Dr. Norris diagnosed right rhomboid strain, prescribed medication, and advised claimant to continue with Dr. Pennington's treatments. Claimant, however, testified that Dr. Norris' April 16, 2002, medical note was incorrect because she was working for the respondent when she was hanging rugs and injured herself and that took place one month before the April 16, 2002, visit and not a week before the visit.

Dr. Norris referred claimant to orthopedic surgeon Milo G. Sloo, M.D. Dr. Sloo first saw claimant on May 15, 2002. Claimant provided Dr. Sloo, not with a history of injuring her neck while hanging rugs at work, but with a history of getting out of bed one month ago with a sudden onset of pain in the upper scapular area of the right shoulder. He diagnosed claimant with a right cervical radiculopathy. Dr. Sloo prescribed medication and had claimant return on May 22, 2002.

During the May 22, 2002, visit, claimant's arm pain had improved and Dr. Sloo placed claimant in a physical therapy program. The doctor also had claimant undergo a MRI examination. The result of the MRI examination revealed a large disc herniated at C6-7 on the right. Dr. Sloo then referred claimant for a surgical consultation with neurosurgeon Raymond W. Grundmeyer, III, M.D.

Dr. Grundmeyer saw claimant on June 19, 2002. For the first time, claimant related a history to a physician of a work-related injury when she provided Grundmeyer with a history of developing at work pain in her right arm about 9 months ago and developing numbness in her right hand about 6 months ago. Because of the large disc herniation, Dr. Grundmeyer recommended surgical treatment consisting of an anterior cervical discectomy and fusion at C6-7.

Although not authorized, claimant underwent the surgical treatment by Dr. Grundmeyer on August 13, 2002. In a letter dated August 12, 2002, to claimant's attorney, Dr. Grundmeyer opined that the C6-7 disc herniation and the onset of radiculopathy were causally related to her work activities while employed by the respondent.

³ Cl. Depo. at 51.

⁴ P.H. Trans., Cl. Ex. 1.

Claimant's attorney had claimant undergo an independent medical examination by neurosurgeon Paul S. Stein, M.D. Claimant also provided Dr. Stein with a history of symptoms starting in her upper back and progressing into her right arm while performing work activities for the respondent in March 2001. Dr. Stein found Dr. Grundmeyer's recommendation for surgical intervention reasonable and appropriate. Based on the history that claimant provided, Dr. Stein opined that claimant's disc herniation was the result of her work activities while employed by the respondent. Dr. Stein specifically noted that his opinion on causation was assuming that the patient had provided him with a reliable history.

Claimant testified she was afraid to make a workers compensation claim because she thought she would lose her job. Claimant also contended that she notified Patrick Goebel, her supervisor until August or September of 2001 and Roger Voge, her supervisor after August or September 2001, that her work activities were causing her to have the pain and discomfort in her neck and right arm. Moreover, claimant testified that she did not know she could report a work-related accident unless it was a sudden accident. Claimant testified she did not know that her ongoing work activities could result in a workers compensation claim. Furthermore, claimant testified she was not sure she had suffered a work-related injury until she found out the injury was severe and she was in need of surgery.

Both of claimant's supervisors also testified in this matter. Patrick Goebel testified at the preliminary hearing before the ALJ and Roger Voge testified by deposition. Both acknowledged that, during the time that claimant worked for respondent, she had some back pain and discomfort in her back and she, on occasion, went to a chiropractor for treatment. But neither supervisor recalled that claimant related those back complaints to her work activities. Both did recall, however, that claimant complained of back problems after she had moved to another residence and also when she was in the process of remodeling a house.

Respondent presented, through its supervisors Mr. Goebel and Mr. Voge, that respondent had trained and advised them to immediately report work-related accidents any time they became aware an employee had suffered a work-related injury. The respondent offered, and the ALJ admitted into the preliminary hearing record, documents that were signed by claimant during respondent's orientation when she was hired in September 2000. Those documents indicated that claimant was also advised she had to report accidents within 10 days and the notice requirement may be extended to 75 days if just cause was established for not giving the 10 day notice. That information was contained in the employee's handbook handed out to claimant and also respondent had claimant sign and date that she had read and understood the Division of Workers Compensation Form 40 explaining the 10 day notice requirement and the extension of the notice requirement to 75 days if just cause was established.

Until claimant was terminated and lost her coverage under the company's medical insurance plan, claimant had not requested medical treatment for her alleged work-related neck and right arm injuries. On the date of the termination, March 28, 2002, respondent's human resource manager met with claimant and notified her of the termination. At that time, claimant still did not notify respondent that she had suffered a work-related injury. But claimant alleges one of the reasons she did not notify respondent of the work-related accident was because she was afraid of being terminated. But even after the termination, claimant still waited until June 11, 2002, to make a demand on respondent for an alleged work-related injury and request for medical treatment.

The Board is mindful that both Dr. Grundmeyer and Dr. Stein related claimant's disc herniation to her work activities while employed by respondent. But the Board also finds both of the doctors' opinions were based on a history of claimant's symptoms starting in March 2001, while working for respondent. Where in fact, claimant had those symptoms and had been treated for those symptoms since 1993 by chiropractor Dr. Pennington.

The claimant is required to provide notice of a work-related accident to the respondent within 10 days or show just cause to extend the notice requirement to 75 days.⁵ Here, the claimant first argues she knew her work was causing injury to her neck while she was employed by the respondent. And before she was terminated on March 28, 2002, claimant, at various times, alleges she generally but not specifically communicated that fact to her supervisors. Thus, claimant argues she complied with the 10 day notice requirement because she notified respondent of the injury before she was terminated on March 28, 2002. On the other hand, claimant argues if the trier of fact does not believe she told her supervisors that her work activities were causing her injury, then she contends she established just cause for not providing the notice within 10 days. Claimant's just cause argument is that she did not know she was injured at work until she found out she had a herniated disc.

As noted, in this case, there is a major conflict between claimant's preliminary hearing testimony, the contemporaneous medical history claimant provided Dr. Pennington, and Dr. Norris, and the testimony of respondent's supervisors. Thus, the Board finds the credibility of claimant is of utmost importance in deciding this case.

The ALJ had the opportunity to assess claimant's credibility and simply not believe the claimant in denying claimant benefits. The Board finds some deference should be given to the ALJ because he was personally able to observe claimant testify. The Board also finds that claimant's testimony is inconsistent and her testimony was contradicted by the testimony of respondent's supervisors. The Board, therefore, concludes that claimant failed to prove she suffered an accidental reinjury arising out of her employment with respondent. Additionally, the Board finds claimant failed to prove she provided respondent

⁵ See K.S.A. 44-520.

with timely notice of the accident and she further failed to prove she had just cause to extend the time for giving notice from 10 days to 75 days.

As provided by the Workers Compensation Act, preliminary hearing findings are not binding but are subject to modification upon a full hearing on the claim.⁶

WHEREFORE, it is the finding, decision, and order of the Board that ALJ Bruce E. Moore's September 18, 2002, preliminary hearing Order is affirmed in all respects.

IT IS SO ORDERED.

Dated this ____ day of February 2003.

BOARD MEMBER

c: Scott J. Mann, Attorney for Claimant
D. Steven Marsh , Attorney for Respondent
Bruce E. Moore, Administrative Law Judge
Director, Division of Workers Compensation

⁶ See K.S.A. 44-534a(a)(2).